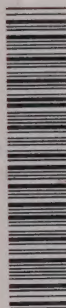


CA1
YL 16
- 1991
B276



3 1761 11970954 1

Municipalities, the constitution,
and the Canadian Federal
System

CA 1
Y4 L6
-1991
B276

Background Paper

BP-276E

**MUNICIPALITIES, THE CONSTITUTION,
AND THE CANADIAN FEDERAL SYSTEM**



William R. Young
Political and Social Affairs Division

October 1991



Library of
Parliament
Bibliothèque
du Parlement

**Research
Branch**

The Research Branch of the Library of Parliament works exclusively for Parliament, conducting research and providing information for Committees and Members of the Senate and the House of Commons. This service is extended without partisan bias in such forms as Reports, Background Papers and Issue Reviews. Research Officers in the Branch are also available for personal consultation in their respective fields of expertise.

© Minister of Supply and Services Canada 1992

Cat. No. YM32-2-276E

ISBN 0-660-14528-6

CE DOCUMENT EST AUSSI
PUBLIÉ EN FRANÇAIS



CANADA

LIBRARY OF PARLIAMENT
BIBLIOTHÈQUE DU PARLEMENT

CA 1
Y216
-1991
B276

MUNICIPALITIES, THE CONSTITUTION, AND THE CANADIAN FEDERAL SYSTEM

The following historical overview discusses the place of municipalities in the Canadian federal system with a particular emphasis on various attempts to gain constitutional recognition for municipal governments.

The major discussion points and conclusions relevant to a revival of any constitutional initiative are:

1. The provinces will jealously guard the constitutional arrangements that give them exclusive control over their municipalities. Any injection of the municipal question into national constitutional discussions has, in the past, provoked a reaction that has jeopardized even the *ad hoc* relationship between the federal and municipal governments.
2. The municipalities' quest for constitutional recognition has been largely motivated by their search for practical ways and means to meet the increasing demands upon their fiscal resources. They are not inherently interested in constitutional recognition (unlike aboriginal people) but see it as one means to solve their financial problems. Municipalities have, however, given clear signals that they would be just as happy to deal with their fiscal situation outside the constitutional debate.
3. As a result of their lack of focus on constitutional issues, the municipalities have never been able to formulate a comprehensive and specific set of constitutional proposals. In the past, municipalities' demands have remained vague and have not dealt with the need to differentiate between constitutional recognition and constitutional powers.

4. Discussions have not even explored the question of whether constitutional provisions for municipalities might add another dimension of inflexibility to the Canadian federal system.
5. Until June 1991, the Federation of Canadian Municipalities (FCM), the national lobby organization, had not become involved in the current constitutional discussions. Recently, the FCM has begun to explore various options that might contribute to the debate, with much of the activity focused on encouraging provincial municipal associations to become involved with provincial legislative committees on the Constitution.
6. One case for involving municipalities in constitutional discussions is based on the argument that their exclusion ignores the fact that the vast majority of Canadians live in cities and that the problems of Canada's large cities are no longer merely local or municipal.

LEGISLATIVE FOUNDATIONS AND OVERVIEW OF MUNICIPAL POWERS

The debate over the need for constitutional recognition of the status of municipalities pre-dates Confederation. In fact, in his report of 1839, Lord Durham argued in favour of an organized system of municipal institutions on the basis of the need for people to settle their local problems and learn to become interested and involved in central issues. He argued that unless municipal institutions were guaranteed by the Constitution "the legislature would never agree to renounce the taxation powers necessary for the establishment of municipal institutions." (1)

(1) Jacques L'Heureux, "Municipalities and the Division of Powers," in Richard Simeon, ed., *Intergovernmental Relations*, Royal Commission on the Economic Union and Development Prospects for Canada, No. 63, University of Toronto Press, Toronto, 1985, p. 199-200.

Although Durham's contentions have been periodically echoed up to the present, his recommendation has never been embodied in Canada's constitutional law. The *Constitution Act, 1867*, 124 years ago established the parameters of current federal and provincial relationships with municipalities. Section 92 of the Act sets out the exclusive powers of provincial legislatures in 16 areas, with section 92(8) giving the legislature of each province exclusive responsibility for making laws relating to that province's municipal institutions. Of the other sections of the *Constitution Act, 1867* with implications for municipalities, section 92(2) grants the provinces the power to impose direct taxes to carry out provincial responsibilities. Because local governments are legally subordinate to provincial governments, the only sources of authority and revenue available to municipalities are those that are specifically granted by provincial legislation.

The scope of provincial control over municipalities is largely unfettered and municipal responsibilities can be altered by votes of the provincial legislature. Although some cities have a separate legislative provision establishing their jurisdiction, most municipalities get their powers from a provincial municipal Act that applies to all local entities within a province. The provinces can alter municipalities' boundaries or powers, as well as their financial resources, and can abolish individual municipalities (as Ontario did when it established regional governments in the Halton-Peel and York Regions, for example). Most municipal borrowing requires provincial approval and zoning and other by-laws are subject to appeal and approval by a provincially-appointed board. At the same time, municipal activities result from the delegation of provincial responsibilities in the areas of local works, education, justice, hospitals and taxation.⁽²⁾

Up to now, municipalities have been allowed sole occupancy of the field of real property taxation, but, apart from convention, there

(2) Harry M. Kitchen and Melville L. McMillan, "Local Government and Canadian Federalism," in Richard Simeon, ed., *Intergovernmental Relations*, Royal Commission on the Economic Union and Development Prospects for Canada, No. 63, University of Toronto Press, Toronto, 1985, p. 220.

is no constitutional prohibition against entry to this field of taxation by either the federal or the provincial governments.

Furthermore, the regressive and restrictive nature of the property tax means that municipal revenues do not necessarily keep pace with economic growth or inflation as do income taxes or even sales taxes. Property taxes include levies both for general municipal purposes and also for schools.

Provincial grants, the other source of municipal revenues, are given with strings attached in the form of conditions that govern how the money will be spent. These grants are made not only to further certain municipal objectives but can include money earmarked for schools and social services. The conditions on provincial money mean that municipalities are limited in their ability to spend their grants for locally-determined purposes but must make choices that meet provincial policy goals.

This situation has become increasingly difficult for municipalities since they are restricted in their ability to run a deficit budget and must obtain provincial approval before undertaking long-term budgeting. If provincial priorities or federal funding suddenly change, a municipality has very little room to manoeuvre between its existing financial obligations and the need to provide new services or to maintain existing services with reduced funds.

For many years municipalities have complained about the restrictions on their decision making, local autonomy, and revenue, and have tried to find alternatives.

MUNICIPALITIES, PROVINCES AND THE FEDERAL GOVERNMENT

The level of urbanization appears to serve as the barometer for provincial attitudes towards municipal institutions. Except in extreme circumstances, such as the municipal default on loans during the Depression of the 1930s, provincial governments generally took a laissez-faire attitude to their municipalities from 1867 to 1960. In provinces with lower percentages of urban inhabitants, local governments were allowed to go their own way and generally provided their citizens with a minimum

level of services, particularly in rural areas. Since then, however, in provinces where towns and cities have grown rapidly, the demand for services (and for money to pay for them) has led to increased provincial involvement and caused upheavals in local government systems.

As the growing urban centres came to play a more important role in the life of the nation, municipalities felt increasingly fettered by the unilateral control of the provinces. By the time of the 1986 census, for example, some two dozen metropolitan areas had a larger population than the province of Prince Edward Island; three of Canada's largest metropolitan areas each had more citizens than any of the four Atlantic Provinces. Of all the provinces, only Ontario and Quebec had populations exceeding those of Montreal and Toronto. At the same time, none of the municipalities, whether large or small, could exercise any real fiscal or legislative autonomy.⁽³⁾

Although in the recent past provincial governments have increasingly exerted their control over municipal activities (i.e. location of hospitals and provision of social services), the provinces have consistently resisted any direct and formal federal involvement with their subordinate level of government, even though the federal government, through joint federal-provincial programs, has been putting up money for services ultimately delivered by the municipalities. Provinces have particularly opposed the establishment of any federal department or agency with a mandate to deal specifically and directly with municipal governments. Apart from the grants that the federal government pays directly to municipalities in lieu of property taxes, federal funds are channelled to municipalities almost entirely through federal-provincial agreements.

Because of the broad range of federal activities that impinge on local areas, however, the provinces have not been able to prevent at least *ad hoc* contact between federal departments and the municipalities. Historically, such linkages have followed informal and

(3) L'Heureux, (1985), p. 199-200; Dr. A.J.R. Smith, Chairman of the Economic Council of Canada, quoted in *The Financial Post*, 13 February 1969.

functional lines. For example, federal transportation specialists deal directly with municipalities about bridges over level crossings of railroads and roadways. It is also important to note that local governments are subject to various federal actions that can affect municipal options and significantly alter the physical and social fabric of urban centres. One example of this might be the impact of federal immigration policy on cities like Toronto, Montreal or Vancouver. The federal government can also exert some control over municipal activities by means of the conditions it attaches to grants to the provinces.

Lack of coordination between *ad hoc* federal activities and relationships and the rapidly expanding municipalities began to cause problems in the 1960s. It became evident that solutions to local problems often had more than a local impact and that federal projects could have undesirable environmental or developmental consequences for municipal governments. For example, the Canada Mortgage and Housing Corporation's financing of residential construction near the Toronto International Airport in the 1960s pre-empted any plans by the federal Department of Transport to expand that facility. In the late 1960s, programs administered by 27 federal agencies had some influence over urban development plans. Other federal actions had unintended consequences for urban life. For example, the *Income Tax Act* deduction for businesses providing parking spaces to employees contributed to urban street congestion.

In so far as municipalities are concerned, recent social and economic developments have conclusively demonstrated that a major argument for changing either government structures or the Constitution is that:

...the problems of our large cities are no longer merely municipal or local problems. The Canadians whom our provincial and federal governments serve are now predominantly urban Canadians. The national goals of high employment, high growth, stable prices, viable international payments' balance, the equitable distribution of rising incomes must now be primarily accomplished within our cities. (4)

(4) Smith (1969).



A HISTORY OF FAILURE: DIRECT FEDERAL INVOLVEMENT IN URBAN ISSUES

Although the constitutional/jurisdictional position of the provinces prevented direct federal intrusions in an area of exclusive provincial jurisdiction, the federal government has made sporadic efforts to rationalize its *ad hoc* linkages with the municipalities. Initially, this was accomplished through the Canada Mortgage and Housing Corporation (CMHC), the federal agency with the closest relationship to urban and municipal issues.⁽⁵⁾

The contacts between the CMHC and the municipalities evolved over time. In 1949, amendments to the *National Housing Act* (originally passed in 1938) authorized joint federal-provincial programs to provide low-priced homes for sale or rent. The amended Act authorized cost-sharing by the federal and provincial governments for land assembly and servicing (75% was paid for by the federal government). Municipalities were allowed to participate in this program if their province passed legislation authorizing local administration of the provincial aspects of these housing activities. A further series of amendments to the *National Housing Act* in 1964 created more comprehensive programs aimed at overall urban renewal and not just housing. As a result, the federal government could authorize a 50% contribution towards the preparation of plans, the acquisition of land and buildings, and the installation of municipal services in urban renewal

(5) To help ease the temporary wartime housing shortage, in 1944 the federal government created a Crown Corporation, the Wartime Housing Corporation, to spend federal money creating housing in urban centres during the Second World War. Under the *War Measures Act*, the constitutional prohibitions that restrained federal involvement in provincial jurisdiction were loosened and the federal government began to build housing in areas where shortages inhibited the production of essential defence projects. In 1946, the assets of this Crown Corporation passed to the Central Mortgage and Housing Corporation, later the Canada Mortgage and Housing Corporation, to carry on the stimulation of housing construction by providing mortgage money at favourable rates.

plans. The federal government could also make loans to the provinces and municipalities to finance up to two-thirds of their costs.

Until the end of the 1960s, the provinces generally went along with these activities, in large part because the conditions in the cost-sharing agreements gave them considerable control and also because, as a Crown corporation, CMHC developed its policies with relative autonomy and without direct control by the federal cabinet. The Corporation also established functional relationships with municipalities and interest groups which also tended to minimize cabinet intervention in its affairs.

The intense constitutional discussions of the late 1960s produced a set of circumstances that ultimately altered this relationship but did not satisfy either the municipalities or the federal government. The Canadian Federation of Mayors and Municipalities intervened in the constitutional debate to state its position but the municipalities consistently related their vaguely expressed constitutional propositions directly to their very specific financial difficulties.

The Federation established a Joint Municipal Committee on Intergovernmental Relations (JMCIR) to elaborate its views throughout the constitutional debate. In 1971, JMCIR presented a brief to the Special Joint Committee of the Senate and the House of Commons on the Constitution. The brief argued that:

... what was decided in the basic law of over a hundred years ago is not as we have so often discovered, necessarily appropriate to the society of a later day. It is not an exaggeration to say that at Confederation, in many respects, the provinces were regarded as extensions of local government. The main responsibilities of the day were assumed by the new Dominion. Changing social and economic concepts, aided by the decisions of the courts as to the meaning of the constitution, by a few constitutional amendments and a good deal of practical and political and administrative judgment have altered the relationship of the provincial governments to the Government of Canada. While the balance of power has shifted from time to time, the overall result has generally adjusted to the times.



But when we consider the relationship of provinces and local governments, we can find no parallel recognition of the forces which were recognized in the growth of provincial power.(6)

In summary, the municipalities defined two general goals:

1. A system of voluntary cooperation under which methods and institutions would be developed for a continuing system of consultation and coordination on matters of mutual concern.
2. A system of tripartite division of powers in which the municipal level of government would have an established constitutional position.(7)

The only clear conclusion that emerged from the municipalities' submissions appeared to be that there should be some form of "tripartitism" either in the division of powers or, more commonly, in a consultation process. For example, the JMCIR proposed that federal-provincial conferences should become trilateral meetings. Constitutional recognition of Federal-Provincial-Municipal Conferences would mean that the municipalities would still be "subject to provincial law but this would be modified by their right to be consulted and to be heard, a right which would be formally recognized and would no longer be a matter of provincial sufferance..."(8)

(6) Canadian Federation of Mayors and Municipalities, Joint Municipal Committee on Intergovernmental Relations, Presentation to the Joint Committee of the Senate and the House of Commons on the Constitution, 2 March 1971, p. 1-2.

(7) Canadian Federation of Mayors and Municipalities, Joint Municipal Committee on Intergovernmental Relations, "The Municipality in the Canadian Federation, for Submission to the Ministers of Municipal Affairs," August 1970, p. 15.

(8) Canadian Federation of Mayors and Municipalities, Joint Municipal Committee on Intergovernmental Relations, Presentation to the Special Joint Committee of the Senate and the House of Commons on the Constitution, 2 March 1971, p. 11

A Member of Parliament who was involved in the constitutional debates noted that:

The [Special Joint Committee on the Constitution of Canada] heard again and again of the need to recognize in constitutional form the third level of government. But once you have adopted this policy, what form does recognition take? There are some 4,500 municipalities in Canada.... Several witnesses generalized about the third level of government but, with rare exceptions, no concrete proposals were made about what should happen once the federal and provincial governments accepted the three tier approach. (9)

The Trudeau government tried -- unsuccessfully -- to marry the municipalities' concept of "tripartitism" (although not enshrining it in the Constitution) with the "pragmatism" of the historical links between the federal and municipal governments. In theory, not only could this avoid the constitutional hurdles but it would "rationalize" federal-municipal relations and establish greater political control at the federal level. Accordingly, in March 1971, Prime Minister Trudeau appointed a Minister of State for Urban Affairs, who took on responsibility not only for CMHC but also for a new Ministry of State for Urban Affairs (MSUA). Given the inescapable constitutional limitations, this ministry had no program responsibilities but had a mandate to plan, coordinate and develop new urban policies; to integrate federal urban priorities with other federal policies and programs; and to develop coordinating intergovernmental relationships. Given this mandate and its lack of funds for programs, the MSUA had to rely on the clout and persuasive powers of its Minister to achieve its goals.

The federal urban initiative had a mixed reception. Hoping that the federal action might help to liberate them from some of the constraints imposed by the provinces, municipalities across the country hailed the formation of the MSUA and welcomed federal support for any action that might give them access to greater financial resources. The provinces, particularly Quebec, remained sceptical of the new agency

(9) Gordon Fairweather, "Municipalities: Orphans in Canada's Constitution," *Canadian Business*, November 1971, p. 40.

and wary of even practical adjustments that might expand into intrusions into their jurisdiction.

The true municipal agenda remained the belief that a constitutionally-enshrined role would mean little unless it led to new financial arrangements for sharing revenue between the federal, provincial and municipal governments. This meant that the municipalities' involvement in the constitutional debate ultimately challenged provincial pocketbooks and eventually led to the downfall of Trudeau's intervention in federal-municipal relations. Although the provinces agreed to send delegations to the first tri-level meeting organized by the MSUA in November 1972, the provinces viewed the tri-level process suspiciously. They saw the meetings as one means of providing *de facto* recognition to the municipalities as a third order of government with a legitimate relationship to the federal government. For their part, the municipalities, even when they attempted to downplay their constitutional aspirations at the first tri-level conference and to concentrate on national solutions to urban problems such as housing and transportation, raised again the spectre of linkage.⁽¹⁰⁾

The first and second tri-level meetings confirmed that the municipalities and the federal government had become allies against the provinces. When the delegates from all three levels of government agreed to set up a task force on all levels of public finance, even Alberta and Ontario, the only provinces to support it, soon withdrew their approval. They felt that the task force would not adequately protect the provincial positions in its factfinding and recommendations. When the task force reported, it confirmed that the system of public finance in Canada prevented municipalities from meeting their responsibilities. The Canadian Federation of Mayors of Municipalities issued a polemical response, *Puppets on a Shoestring*, that directly blamed the provinces for the financial problems of local governments. After the provinces refused to attend a

(10) The municipalities based their presentation on the argument that the municipal tax base should not be eroded for the provision of education, which seriously reduced the amount that was available for strictly municipal purposes.

third tri-level meeting scheduled for August 1976, the conference was cancelled, and the tri-level process ended.

As a result, by threatening not to cooperate with the federal government in programs of interest to the municipalities, the provinces gained even greater power at the expense of the other two levels of government. Ontario refused to accept CMHC money for a new town in Pickering rather than share planning authority with the MSUA. In view of the Department's lack of credibility and the government's desire to cut expenditures, the MSUA was abolished on 31 March 1979. In that year, the federal government also moved to consolidate provincial control over funds for urban redevelopment. CMHC's money for the Neighbourhood Improvement Program, for land assembly (the Municipal Incentives Program) and services (the Municipal Infrastructure Program) was put into a single block funding program (Community Services Contribution Program). The provinces were left to decide which of the three former program areas would benefit.

CANADIAN MUNICIPALITIES AND THE CONSTITUTIONAL NEGOTIATIONS OF THE LATE 1970s

The municipalities' participation in the round of constitutional talks which began in the late 1970s demonstrated that they again had no clear suggestions. Their position appeared, as before, to be founded on the belief that mentioning municipalities in the Constitution would help them to solve the problem of how to finance the services imposed upon them by more senior levels of government. The Federation of Canadian Municipalities (FCM) the successor to the Federation of Mayors and Municipalities, rejected the argument that local government "...is the level of government responsible for the basic needs of people. We believe it is essential to enlarge and enhance the role of local governments in any new constitutional framework and to ensure its autonomy." (11)

(11) Federation of Canadian Municipalities, Brief to the Task Force on Canadian Unity, 20 June 1977.

The Resource Task Force on constitutional reform that assisted the FCM in preparing a resolution for presentation to the annual meeting drew up the following text:

BE IT RESOLVED that the following principles should apply to the position and status of the Municipalities in any new, or "renewed", Canadian federal system.

1. The Constitution of Canada should expressly recognize and protect Municipal government within the general system of federal constitutional government established thereunder.
2. It is understood that, within the federal constitutional system, Municipal government should fall within Provincial jurisdiction
3. The Constitutions of the Provinces, within the federal constitutional system, should expressly recognize and protect the autonomy of Municipal government as to the following areas:

(a) Law-making autonomy: Each municipality should have independent law-making powers in defined areas, which should not be withdrawn or varied by the Provincial governments except by the ordinary legal processes and procedures applicable to the amendment of Provincial Constitutions;

(b) Fiscal autonomy: Each Municipality should have access to the financial resources appropriate to the carrying out of its governmental responsibilities, and, to that end and without limiting the foregoing, should have power to improve Real Property, Licence, Amusements, and Rental taxes; and, subject to appropriate Provincial-Municipal tax-sharing arrangements, Income Tax.

(c) Institutional autonomy: Each Municipality should have the power, subject to conformity to the general principles of democratic constitutionalism set out in the Constitution of Canada and also in relevant Provincial Constitutions, to determine and review its own Municipal Charter. (12)

(12) Federation of Canadian Municipalities, Resource Task Force on the Constitution, "Municipal Government in a New Canadian Federal System," Ottawa, 1980.

The FCM presentation to the parliamentary Joint Committee on the Constitution, on 20 November 1980, was based on the Resource Task Force Report and included the following recommendations, which are almost identical to those in the 1978 brief:

VIII. We urge that municipalities be recognized as a distinct level of government under the new constitution;

IX. We urge that the municipal level of government be assigned in the first instance certain powers to be scheduled in the constitution and that municipalities may exercise those powers as a right so long as the provincial or federal governments have not occupied the field by adopting specific statutes to deal with matters within their residual jurisdiction. (13)

The 1980 brief also referred to "Guiding Principles," of which the fourth was:

Suggestions for enhancing the status of municipalities under any new constitutional arrangement should be based on the principle that municipalities, in the first instance, ought to be assigned those powers which experience has indicated are best exercised at the local level. Such powers might include housing, job opportunity programs, fire protection, education, public health, social welfare, air quality, water services, sewage service and treatment, policing, environmental protection, and recreation. (14)

An analysis of the FCM position suggests that the municipalities were as much interested in constitutional *recognition* as in constitutional powers. After the First Ministers' constitutional talks in September 1980, the FCM statement set out the objective of recognition as an additional legislative level. The president chose to amplify this by offering examples of recognition, such as the federal government's according official observer status to representatives of the FCM at the

(13) Parliament, Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, 20 November 1980, 9:10.

(14) Federation of Canadian Municipalities, Presentation to the Special Joint Committee of the Senate and the House of Commons on the Constitution, 20 November 1980, p. 9.



First Ministers' meetings and the inclusion of municipal representatives in the delegations from Nova Scotia and Ontario. He expressed the wish that all provinces should follow suit. (15)

Essentially, however, the statements of the FCM suggest that municipalities had a greater concern with entrenched financial resources than with entrenched legislative powers. As a representative of the FCM told the Joint Committee on the Constitution with regard to municipal requests for entrenchment of their power to tax:

I think that what we are talking about when we are asking for income tax is a clear defined portion of the income tax settled upon by the provinces and by the federal government, that we could rely on as an added income to the municipality so that we could release the burden of property tax. (16)

REACTION TO THE MUNICIPALITIES INTERVENTION

The federal government had learned from its "tri-level" experiments of several years before and took a safe position. On 9 October 1978, Prime Minister Trudeau wrote to the FCM agreeing to consider municipal recognition in a revised Constitution, provided that this recognition did not interfere with provincial powers. He stated that:

The federal government thinks it would be desirable to consider whether a new Constitution should not recognize specifically the existence, and the need for existence, of the third level of government....

Provided that the ultimate responsibility of the provinces is not in question, there could be merit in trying to describe in the Constitution the role which the "third level" plays in the total fabric of Canada. It could also be useful to try to spell out the basic kinds of services that are traditionally provided by the "third level."

Given this guarded statement from the federal level and their own earlier experience, even the municipalities were unwilling to

(15) *Forum*, Vol. 4, No. 12 (October 1980), p. 1.

(16) Minutes of the Special Joint Committee of the Senate and the House of Commons on the Constitution (1980), 9:12.

tackle the provinces head on. One of the main barriers to a constitutional amendment that would enhance the powers of the municipalities was obtaining approval from the required number of provincial legislatures. Mayor Dennis Flynn of Etobicoke, a member of the national executive of the CFM, told the Joint Committee on the Constitution on November 1980 that:

... we are pragmatists, and understand the limitations that we can request and understand that the provinces are reluctant to have municipalities talk directly to the federal government.

Therefore we would like to see anything which was placed in the constitution still within the framework of the provincial area...

Mr. Crombie: So that in fact you would be happy in each of the provinces if there was a charter dealing with municipalities, any provincial charters dealing with municipalities which gave you autonomous areas of jurisdiction and also autonomous areas in terms of the raising of tax revenues.

Mayor Flynn: As long as that was folded in the Canadian constitution as a whole. (17)

Commentators at the time, as well as later analysts, have agreed that constitutional recognition of municipalities became a dead issue in light of provincial opposition. The analysis prepared for the Macdonald Commission stated that "it is out of the question that the legislative assemblies of such a majority of provinces would agree to this loss of power." (18)

Experts have often raised another problem: What would be the long-term effect of another constitutional tier of government? They have concluded that, given the difficulties already inherent in federal-provincial relations, constitutional recognition of the municipalities might only add another combatant and increase the existing inflexibility and complexity.

(17) *Ibid.*, 9:13, 20.

(18) L'Heureux, (1985) p. 201.



If local governments were to have their way, they would likely ask for constitutional standing as equal partners in Confederation. Ideally this recognition would provide the legislative and fiscal autonomy which local governments require to meet the demands for local goods and services. But, if this were done, how successful would it be? Federal-provincial relations are defined by the Constitution, yet the extent of federal-provincial discord is well known. Provincial governments criticize the intrusion which they see the federal transfers of expenditure powers making into their areas of responsibility. In some ways, the delineation of authority provided by the Constitution has impeded a rational reallocation of responsibilities over time as conditions changed from those of the nineteenth century. Might a constitutional standing for local government impose another element of inflexibility while protecting and enhancing local government?(19)

FROM PATRIATION TO 1990

Since the enactment of the *Constitution Act, 1982*, the question of constitutional status for local governments seems to have faded from the limelight. The municipalities did not address the issue in any presentations to the various parliamentary committees that held hearings on the 1987 Meech Lake Accord, much to the surprise of at least some commentators:

It seems curious that 4,500 municipalities large and small have not taken this opportunity to assert themselves and enter the debate and thereby assure themselves of a legitimate and constitutionally confirmed place in Confederation. It is in the cities and towns of this country Canadians live and make their living. Therefore the institutional and constitutional structure ought to reflect this urban reality.(20)

At the same time, the nature of the public debate over constitutional issues, as they affect municipalities, has not been advanced

(19) Kitchen and McMillan (1985), p. 245.

(20) H. Peter Oberlander, "Preface," *Meech Lake: From Centre to Periphery*, University of British Columbia, 1988, p. 3.

since the late 1960s. The issue of constitutional status for municipalities has received little press or academic attention.

Throughout the balance of the 1980s, the municipalities and their organizations moved back to concentrating on lobbying for practical and specific services. The Federation of Canadian Municipalities reorganized and began to look for partners in joint ventures. For example, in 1985, an agreement with the Department of Regional Industrial Expansion established the Municipal Economic Development Program to strengthen the ability of local governments to promote economic development. The FCM established a series of task forces to devise a municipal point of view on national issues that affected its members. These task forces and their yearly policy statements assist the FCM in lobbying the government on an issue-by-issue basis with the relevant federal authority.

The measures introduced by the federal Minister of Finance in his various budgets since 1986 provide an important demonstration of how decision-making in the federal sphere affects provincial governments and in turn, Canadian municipalities. Faced with cuts to federal funds, the provinces tended to push the burden downwards to the municipalities, which in turn passed on the costs to consumers.

Since the 1986 budget, the major concern of the municipalities has been the "downloading" of costs, whereby financial restraints at the federal and provincial levels of government are passed on to the municipalities. Although the FCM did not make a formal submission regarding the legislation, municipal governments across the country have taken the *Government Expenditure Restraint Act* (S.C. 1991, c.9), passed in January 1991, as the most visible and symbolic "downloading" exercise. The federal government imposed limits on payments provided to the provinces under Established Programs Financing provisions, money traditionally spent on health care and education. This freeze was passed on to the municipalities. In addition, limits placed on the growth of Canada Assistance Plan (CAP) payments in Ontario, have forced municipalities in that province to choose between raising regressive property taxes or cutting services.



AFTER MEECH LAKE

Municipalities have been cautious about involvement in the most recent constitutional discussions. The FCM did not take public positions during the Meech Lake negotiations or the studies that resulted in the Charest or Edwards-Beaudoin Committee reports. This situation began to change when the Municipality of Metropolitan Toronto made a public submission to the Citizens' Forum that called for "a new arrangement for large urban centres such as Toronto, Montreal, Vancouver if not for all local governments." Metropolitan Toronto again raised the call for constitutional recognition of municipalities as a means of meeting the problems of municipal financing, service delivery and planning.⁽²¹⁾

Following this, as Canadian municipalities began to consider how to ensure their participation in the constitutional debate, they moved cautiously in order not to arouse provincial opposition. In June 1991, the FCM adopted an emergency resolution at its annual meeting in St. John's and presented it to Constitutional Affairs Minister, Joe Clark, who attended the meeting. The resolution reiterated the municipalities' concern with fiscal matters and stated that:

WHEREAS Canada's municipalities have become the centre stage of a modern and interdependent industrialized society with all the accompanying social, material, cultural and environmental challenges;

WHEREAS federal, provincial and territorial orders of government are shifting an ever greater burden from their jurisdiction onto the shoulders of municipalities at a time when municipalities themselves are faced with the staggering problems of renewing urban infrastructure and meeting a host of environmental and social challenges;

(21) Quoted in Evelyn S. Ruppert, *Municipalities and a Changing Canadian Federalism: A Background Paper Prepared for Delegates to the 1991 AMO Conference*, Association of Municipalities of Ontario, August 1991.

WHEREAS the ability of municipalities to deal with these challenges requires a federal, provincial, territorial and municipal agreement on a new distribution of powers and fiscal resources;

WHEREAS the federal government, in its Speech from the Throne committed to assessing the various proposals for constitutional reform and submitting to the people of Canada, constitutional proposals for the renewal of the Federation;

BE IT RESOLVED that the Federation of Canadian Municipalities, as the national voice of local government, in concert with provincial/territorial affiliates, be invited by the federal, provincial and territorial governments to participate in this process with a view to obtaining the recognition of municipal government in the constitutional framework of the country; and

BE IT FURTHER RESOLVED that the Federation of Canadian Municipalities work with its provincial/territorial affiliates to arrive at a common position on the constitutional question.

Following this careful response to the current round of constitutional discussions, the FCM held a think-tank on the Constitution and local government at the meeting of the National Board of Directors that was held on 4 September in Saint John, New Brunswick. The national organization, however, has yet to respond to *Shaping Canada's Future*, the latest federal government constitutional proposals.

History appears to have encouraged the municipalities to adopt a more flexible and diverse approach to the present constitutional circumstances. In addition to arguing for a means of recognition for municipal governments in the federal Constitution, the municipalities seem headed in the direction of targeting the provinces and urging legislation to change the provincial-municipal relationship. In September 1991, the Nova Scotia Union of Municipalities urged the Nova Scotia Working Committee on the Constitution to consider "provincial legislation that spells out in



broad terms, the rights of municipalities" and "enabling provincial legislation that gives municipalities the practical ability to manage their day-to-day affairs." Mayor Gordon Campbell of Vancouver has presented a similar program to the Union of British Columbia Municipalities.⁽²²⁾

These recent arguments for a municipal bill of rights at the provincial level have the advantage of simplicity and flexibility but may not solve the municipalities' complaints about lack of autonomy. Such a bill of rights might be subject to the same regular legislative procedures for amendment or repeal that currently apply to the provincial municipal Acts.⁽²³⁾ In addition, such a bill of rights could lead to the fragmentation of the current standard forms of municipal administration and create a patchwork of municipal governmental structures across the country.

An overriding concern with fiscal matters will determine the tone of any municipal submissions in the constitutional debate at either the federal or provincial level. In Ontario, for example, the Metropolitan Toronto submission to the Spicer Commission therefore called for a new "fiscal order" that would link constitutional recognition with a reform of intergovernmental fiscal arrangements.⁽²⁴⁾ Municipalities in that province have enthusiastically supported a "disentanglement exercise" that is attempting to establish the proposition that "the level of government responsible for a service should be responsible for funding it and for

(22) Union of Nova Scotia Municipalities, *Submission of the Union of Nova Scotia Municipalities to the Working Committee on the Constitution*, September 1991.

Gordon Campbell, *Local Government and the Constitutions: Outline for a Presentation to the Union of B.C. Municipalities 1991 Convention*.

(23) Amendment might be made more difficult by, for example, replacing the requirement for a simple majority with a requirement for agreement of 60% of the members of the legislature.

(24) Evelyn S. Ruppert (1991), p. 7. Ruppert cites Metropolitan Toronto's brief to the Spicer Commission submitting that: the federal government raises 44% of all government revenue but spends 40% on its needs; provinces raise 41% but spend 32% of the total; municipalities and hospitals collect 10% of total government revenues but require 24% to pay for their services. The differences are accounted for by "unpredictable and uncertain" fiscal transfers.

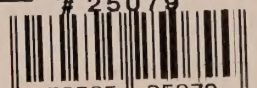
generating the revenues to support it." Seemingly, municipalities are prepared to argue that a new provincial-municipal financial arrangement giving municipalities enhanced powers to raise revenue will require formal recognition at both the federal and provincial levels.





ACCO. USA
WHEELING, ILLINOIS 60090

25079



0 50505 25079

EXECUTIVE RED/ROUGE EX/ROUGE E1

MADE IN U.S.A.

